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No. 02-1199

In The

Supreme Court of the United States

DARREL D. SMITH,

Petitioner,

v.

TOM GRIMMETT, JOHN PETER LEE, LTD., NANCY L. ALLF, EDWARDS & HALE, LTD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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14 pp

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REPLY BRIEF

A. Introduction – Core Of Case – Admitted Prejudgment

Petitioner Darrel D. Smith hereby replies to the brief in opposition to certiorari filed by Respondent John Peter Lee, Ltd. While Respondent has made comments regarding Petitioner's writ for certiorari, Respondent has not denied the salient fact that **Judge Jones relied on opinions from vacated hearings to enforce a settlement agreement, instead of relying on evidence produced at the remanded evidentiary hearing.**

Relying on vacated hearing to enforce a settlement agreement is actual bias resulting from a prejudgment. This violates due process because the settlement agreement was not enforced on evidence presented at the remanded evidentiary hearing. Actual bias requires recusal and vacatur of orders.

The fatal flaw made by Lee and the Ninth Circuit is that they only determined their facts on *initial hearings* (involving motions on malpractice) in which the bias was initially discovered without considering the evidence from the recusal hearing. While these *initial hearings* objectively reveal bias, they might be construed otherwise. However, Judge Jones, during the *recusal hearing*, straight forwardly **admitted** for the record that he formed "the opinion" (p. 47a) to enforce the settlement agreement **only once** during the vacated non-evidentiary reinterpretation hearings, and he states:

> "The *first time that I formed an opinion* was . . . what I thought was reinterpretation [vacated non-evidentiary hearing] of the settlement agreement; *that's the only time* I formed an impression."

See p. 45a. (Emphasis added). During the recusal hearing, he further clarifies that he only formed "the opinion" during the vacated hearing and further *tries to justify* his reliance on his opinions from the vacated hearings. As a consequence, he does not recuse himself because he

believes that he has justified the prejudgment bias. But his attempted justification only emphasizes the prejudgment and bias.[1]

The central issue of this appeal is whether opinions from vacated hearings are a source outside the judicial proceeding at hand. This Court's *Liteky* case unqualifiedly says yes. *Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), which states this about the "extrajudicial source doctrine":

> We say that the doctrine was less than entirely clear in its application for several reasons. First, *Grinnel* (the only opinion of ours to recite the doctrine) clearly meant by "extrajudicial source" a source *outside the proceeding at hand* – which would include as extrajudicial sources *earlier judicial proceedings conducted by the same judge* (as are at issue here). Yet many, perhaps most, Court of Appeals considered knowledge (and resulting attitudes) that a judge properly acquired in an earlier proceeding not to be "extrajudicial." (Cites omitted).

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[1] Since the opinion was only formed ***once*** during a vacated reinterpretation hearing (see p. 45a), it was impossible to form it during the evidentiary hearing. As a result, the settlement agreement was enforced on exactly the same terms as the vacated settlement agreement. See p. 52a. Judge Jones incorrectly believes that vacated hearings can be relied on for rulings in subsequent hearings. Judge Jones makes this clear in his remarks on the record. Judge Jones does not believe that *Liteky*'s "extrajudicial source" applies to bankruptcy proceedings (neither adversary proceedings nor **vacated** proceedings – both were involved in this case). See p. 41a. Judge Jones believes that he could use opinions from vacated hearings because the appellate court did not tell him to do away with them – of course opinions and evidence from vacated hearings are non-existent under the law. See p. 52a. During the recusal hearing, Judge Jones is using recusal terms when referring to his "firm opinion" and "the opinion." See pp. 46a-47a. For remarks that Judge Jones set forth for the record, see his ruling on pp. 39a-45a; also see original Petition.

Liteky, 510 U.S. at 545, 114 S.Ct. at 1152 (Emphasis added). The Ninth Circuit is still making the same mistake.

As a consequence, this Court should allow a writ of certiorari, or this Court should use its supervisory powers over the lower courts and direct the lower courts to consider the admitted prejudgments made during recusal and to follow recusal law as set forth by this Court in *Liteky*.

B. Reliance On Opinions From Vacated Hearing Violates Due Process

Lee agrees that Judge Jones made identical rulings in the remanded evidentiary hearing that he had made in vacated prior non-evidentiary hearings. Lee argues that the identical rulings were justified because the same evidence presented in the vacated non-evidentiary hearing was presented in the remanded evidentiary hearing. While much of the evidence was the same, the evidence presented at the evidentiary hearing was done in a different manner so that its truthfulness could be tested, and in addition, other evidence was presented. The fact that the evidence presented at the vacated hearing was also presented at the evidentiary hearing does not mean that the evidentiary ruling fulfills the due process requirements for a fair hearing. In fact, it has no bearing.

To have a fair hearing, the ruling in the evidentiary hearing has to be based on the evidence presented at the evidentiary hearing. When the proceedings of the former hearings have been vacated and set aside by the order of the court, the remanded hearing proceeds de novo. *Day v. Amax, Inc.*, 701 F.2d 1258, 35 U.C.C. Rep. Serv. 1416 (8th Cir. 1938); *Kimble v. Degenring*, 116 N.J.L. 602, 186 A. 451 (N.J. Sup. Ct. 1936). It must be conducted in the manner in which it would be conducted if there had not been a previous hearing. *Shaw v. Dorris*, 290 Ill. 196, 124 N.E. 796 (1919); *Franklin Discount Co. v. Ford*, 27 N.J. 473, 143 A.2d 161, 73 A.L.R.2d 1316 (1958); *Nohrden v. Northeastern R. Co.*, 59 S.C. 87, 37 S.E. 228 (1900).

The flaw with Lee's argument (and the Ninth Circuit's decision) is that the evidentiary ruling was based on opinions formed during vacated non-evidentiary hearings. Lee does not deny that Judge Jones relied on vacated hearings to enforce the settlement agreement – nor can it. But Lee tries to justify it by arguing that the same evidence was presented at the evidentiary hearing as was presented at the vacated non-evidentiary hearings. Due process does not require that the same evidence be presented at the evidentiary hearing that was presented at the vacated hearing, but it does require that the new ruling be based only on the evidence presented at the evidentiary hearing. It is the balancing of the evidence during the evidentiary hearing that assures a fair hearing. This requires an open mind unencumbered by prejudgments. The purpose of an evidentiary hearing is to have evidence presented so that a decision can be based on it, not on oral arguments of vacated non-evidentiary hearings.

While Lee does not deny that Judge Jones formed his opinion only once during the vacated non-evidentiary hearing, Lee tries to justify this by claiming that Judge Jones hoped to have an open mind. This is fatal for the following reasons:

1. Hoping to have an open mind is not the same as having an open mind as required by due process.
2. At best, having opinions from vacated hearings skews the balancing of the evidence required of an open mind. In reality, having firm opinions from former hearings eliminates an open mind. It makes fair judgment impossible.
3. Having formed "the opinion" only once during vacated hearings, the opinion was *not* determined from the evidence of the evidentiary hearing. *If Judge Jones had finally ruled based on the evidence in the evidentiary hearing, he could have stated so, but he did not.* However, he clearly states that he only

formed "the opinion" once during vacated hearings – no other time.

Judge Jones states that he hoped that he kept an open mind based on the legal standards the appellate court gave him. As Judge Jones states, he did not believe that it gave him any standards, which it did not. All the appellate court did was vacate and remand for an evidentiary hearing. Since there were no special instructions, the hearing had to be de novo. De novo means a new hearing in which the ruling is based on the evidence presented, not on any opinions or evidence of prior vacated hearings.

Judge Jones also believes that *Liteky* does not apply to bankruptcy proceedings, not even vacated hearings. See p. 41a. This is clearly not the law. *Frates v. Winshienk*, 882 F.2d 1502, 1504 (1989). This violates due process because it results in not having a fair hearing.

In addition, Jones made it clear that he believes that he can use prejudgments from the vacated hearing, and he states **"the appellate court did not tell me to do away with the understandings or recollection or impressions of the proceedings prior to the appellate ruling."** See p. 52a (Emphasis added). As a result, Judge Jones believes that an open mind includes evidence and opinions from a vacated hearing. Of course, this contradicts *Liteky*, which requires that each proceeding be based on the evidence presented, especially evidentiary hearings. See *Liteky* at 510 U.S. at 545, 114 S.Ct. at 1152.

C. Admitted Prejudgment Makes Fair Judgment Impossible

Lee incorrectly argues that Smith did not meet the "deep-seated favoritism or antagonism that would make fair judgment impossible" standard set forth by *Liteky* because "[a] disagreement over a judge's ruling or concern about an order that has already been entered is not a basis of recusal." Smith has never considered rulings alone to be a basis for recusal. The basis for recusal is the reliance of Judge Jones on vacated hearings for subsequent rulings.

Both Lee and the Ninth Circuit miss the point because they base their conclusion only on the hearings that initiated the recusal hearing. While the *initial hearings* (regarding malpractice motions) indicate recusal and were the basis for the recusal motion, it could be argued that they were not sufficient for recusal. However, they both ignore the statements made by Judge Jones during the *recusal hearing* (when he makes comments in the record) that he only once formed "the opinion" to enforce the settlement agreement, which was during the vacated non-evidentiary hearings, and he further tries to justify his reliance on the prejudgment. However, this only emphasizes his reliance on the vacated hearings. See footnote 1.

Smith agrees that he cannot base recusal on rulings alone, and that is why he filed the motion for recusal after Judge Jones disclosed that he relied on opinions formed during vacated hearings in order to enforce a settlement agreement. Of course, the reliance on prejudgments violates due process because the evidence presented is not relied on to enforce the settlement agreement, and as a result, this makes fair judgment literally impossible. In fact, this is actual bias and prejudice, which requires recusal and vacatur of orders.

As a consequence, this court should issue a writ of certiorari, *or* this court should invoke its supervisory powers and require the lower courts to consider the admitted prejudgments made during the recusal hearing and to follow current recusal law of *Liteky*.

D. Actual Actions Control, Not General Concepts

While Lee states that Judge Jones sets forth in the record that he generally has an open mind when he listens to oral arguments, Judge Jones makes it clear that he does not always follow this practice. See p. 45a. In any event, what Judge Jones generally does is not the criteria to determine an open mind. An open mind is determined by what he does in a specific hearing. In this case, Judge Jones specifically states that he formed his opinion to enforce the settlement agreement only once during vacated

hearings, not the remanded evidentiary hearing. See footnote 1.

E. Res Judicata Does Not Apply – Smith Is Not Bound By Representations Of Vacated Hearing

Lee claims that Smith is bound by res judicata because of his representations and arguments during vacated hearings. However, representations and arguments made during a vacated hearing are not binding for subsequent evidentiary hearings. *Continental Casualty Co. v. Goodwin*, 69 P.2d 644, 645 (Okl. 1937) (stating "[t]he parties are not bound by admissions made by them for the purpose of the former trial." Cites omitted).

F. Dissatisfaction Is Not A Basis For Recusal

Lee incorrectly argues that Smith should have moved for recusal when he was dissatisfied with identical rulings. However, dissatisfaction with identical rulings alone (or any ruling) is not a basis for recusal. Smith promptly filed for recusal after Judge Jones disclosed that he had relied on vacated opinions for a subsequent remanded evidentiary hearing. This is a basis for recusal based on prejudgments, and it is actual bias, which violates due process.

G. Smith's "Frivolous" Appeals Have Been Vindicated With Judge Jones' Disclosure Of His Hidden Bias

Lee claims that Smith's actions were frivolous and claims that this is confirmed by Judge Jones' holdings. Smith appealed various rulings because he knew that they were wrong. Had Judge Jones disclosed his bias earlier, the various appeals would not have been required. The foundation of the various rulings is based on Judge Jones' bias that flowed from prejudgments involving the settlement agreement. Smith did not know of Judge Jones' hidden bias (whether intentional or unintentional) until he disclosed it. The appeals could have been alleviated had

his bias been known. In any event, Smith is entitled to fair hearings and to pursue his rights until he hopefully receives them. Judge Jones' disclosure of his prejudgment vindicates Smith's action regarding Judge Jones' rulings. If there is a culpable person, it is not Smith but Judge Jones for not disclosing his bias earlier. Since the judicial system created the injustice (by Judge Jones not disclosing his prejudgment), this court should rectify Smith's plight.

H. *Frates* Holds That Bankruptcy Administrative Proceedings May Not Influence Adversarial Proceedings

Lee misstates *Frates*. While *Frates* states that a bankruptcy judge may preside over both the administrative and adversarial portions of a bankruptcy case (as quoted by Lee), the next sentence (which Lee does not quote) states that "*recusal is necessary* if there is evidence of *actual bias*, if the bankruptcy judge by words or actions reasonably appears to have *prejudged adversarial proceedings* over which he is to preside, or. . . . " *Frates v. Winshienk*, 882 F.2d 1502, 1504 (1989) (Emphasis added.). The *Frates* case found no actual bias or prejudgment, and as a result, it found no bias. The pivotal factor in determining bias is whether there is actual bias or prejudgment, not whether a judge can preside over both administrative and adversarial portions of the bankruptcy.

While *Frates* did not show actual bias or a prejudgment, Smith shows that Judge Jones had actual bias because he admitted that he had prejudged the remanded evidentiary hearing by relying on opinions formed as the result of vacated prior non-evidentiary hearings. Due process is violated because *vacated hearings* require a subsequent de novo hearing since vacated hearings are a nullity, and as a result, **opinions based on vacated hearings are based on nothing**. Due process is further violated because the opinions from *non-evidentiary hearings* do not have the safeguards of an evidentiary hearing. As a result, prejudgments and actual bias make fair

judgment impossible, which requires recusal and vacatur of orders.

I. This Appeal Is Not Moot

Lee incorrectly argues that there are no matters left for adjudication. However, there are tax matters to be resolved, and the trustee remains in control of assets that belong to Smith. A reversal of the Ninth Circuit's decision would return those assets and control of this case to Smith, thus enabling Smith to deal effectively with the tax and other problems that the improper enforcement of the settlement agreement caused.

Lee also incorrectly argues that all prior adjudications are final. While Smith has appealed various ruling on legal ground available at the time, Judge Jones did not disclose his bias until after the appeals. As acknowledge by the Ninth Circuit, Smith timely appealed the recusal issue.

Lee's argument that Smith is not allowed to recuse Judge Jones for actual bias because Judge Jones hid his bias until res judiciata made Smith's remedies ineffective is absurd. This would allow cases to be decided without due process of law. If Lee's argument were to be allowed, there would be no confidence in our system of justice because evidence presented would not have to be the basis for determining cases. The absolute fundamental foundation of our system of justice requires that hearings be determined on the evidence presented.

Even after a judgment becomes final, they can be set aside. See *Preston v. U.S.*, 923 F.2d 731, 735 (9th Cir. 1991); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 827-828, 106 S.Ct. 1580, 1588-1589, 89 L.Ed.2d 823, 836-837 (1986) (stating "that the 'appearance of justice' will best be served by vacating the decision and remanding for further proceedings," which was the result of disqualification based on due process requirements of the Constitution); *United States v. State of Washington*, 98 F.3d 1159, 1164 (9th Cir. 1996) (stating "[i]f the conflict of interest is ***disclosed only after the judgment becomes final, the***

judgment can be set aside under Rule 60(b)(6). *Liljeberg*, 486 U.S. at 863, 108 S.Ct. at 2204.") (Emphasis added.); and *Knapp v. Kinsey*, 232 F.2d 458, 465 (6th Cir. 1956) stating:

> One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that *fairness requires an absence of actual bias or prejudice* in the trial of the case. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942; *Talbert v. Muskegon Construction Co.*, 305 Mich. 345 348, 9 N.W.2d 572. If this basic principle is violated, the judgment *must be reversed. In re Murchison*, supra; *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481; *Moskun v. United States*, 6 Cir., 143 F.2d 129, 130; *N.L.R.B. v. Phelps*, 5 Cir., 136 F.2d 562.

(Emphasis added).

J. Conclusion – "Fair Judgment Impossible"

The concept of "fair judgment impossible" embraces the judge more than justice. It shatters justice much of the time. **It does not in this case because the admitted prejudgment literally makes it fair judgment impossible.** However, in too many cases, the frailties of the judge are embraced over justice because another hearing (a fair hearing) is thought to impose too many costs – financially or otherwise. The concept of "fair judgment impossible" does not embrace justice. Impossibility never does. There must be a better concept!

Smith respectfully requests that this Court grant the Petition *or* exercise its supervisory powers.

Respectfully submitted,

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